

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20**

**MARINHEALTH MEDICAL CENTER
Employer**

and

Case 20-RC-356371

**NATIONAL UNION OF HEALTHCARE
WORKERS (NUHW)**

Petitioner

DECISION AND DIRECTION OF ELECTION

The above-captioned matter is before the National Labor Relations Board (the Board) upon a petition duly filed under Section 9(c) of the National Labor Relations Act (the Act), as amended. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me. Upon the entire record in this proceeding, I make the following findings and conclusions.

I. SUMMARY

MarinHealth Medical Center (the Employer) operates an acute care hospital located at 250 Bon Air Road, Greenbrae, California. On about December 5, 2024, National Union of Healthcare Workers (Petitioner) demanded that the Employer recognize it as the exclusive collective-bargaining representative of the 21 full-time, regular part-time, and per-diem pharmacists employed by the Employer. On December 9, 2024, the Petitioner filed the instant petition.

The Employer takes the position that the pharmacists are supervisors within the meaning of Section 2(11) of the Act and should be excluded from any bargaining unit on that ground. Because staff pharmacists comprise the entirety of the petitioned-for unit, the Employer argues that the petition should be dismissed. The Employer maintains that the pharmacists are supervisors by virtue of their asserted authority to responsibly direct and assign work. The Petitioner takes the position that the staff pharmacists are not statutory supervisors and that the petitioned-for unit is appropriate.

A hearing officer of the Board conducted the hearing in this matter on December 18 and 20, 2024. As explained below, based on the record, exhibits, and relevant Board law, I find that the Employer has not met its burden of establishing that the pharmacists are supervisors within the meaning of the Act.¹ Accordingly, I find that the petitioned-for unit is appropriate and shall direct an election in that unit.

¹ The Board has historically found pharmacists to be professional employees. See e.g., *Mount Airy Psychiatric Center*, 253 NLRB 1003, 1005 (1981); *San Jose Hospital*, 228 NLRB 21 (1977); *Kaiser Foundation*, 219 NLRB 325 (1975).

II. FACTS

The Employer operates a 320-bed acute care hospital that maintains a 24/7 trauma service center and an emergency department. The Employer's pharmacy serves hospital patients and is also open 24/7. There is one main pharmacy and a satellite pharmacy at the Employer's Greenbrae facility.

Clinical Pharmacy Supervisor Bethanne Carpenter supervises the pharmacists, assigns them projects and approves their timecards. (Tr. 149)² She reports to Pharmacy Manager and Pharmacist-in-Charge Caroline Chellamy. Technician Supervisor Kristi Hensley, who supervises the pharmacy technicians, also reports to Dr. Chellamy. Director of Pharmacy Arlene Johnstone supervises Ms. Hensley, Dr. Carpenter, and Dr. Chellamy.

Dr. Carpenter, Dr. Chellamy, and Director Johnstone take shifts as all managers-on-call to provide staff support. Dr. Carpenter and Director Johnstone do not work in the pharmacy but visit the pharmacies multiple times per week. (Tr. 129, 158)

Pharmacists and Pharmacy Technicians

The Employer employs twenty-one pharmacists. All pharmacists hold active licenses with the California State Board of Pharmacy. Pharmacists work on eight different shifts at staggered times at the pharmacies and other locations throughout the hospital. Their hours vary depending on their location. Pharmacists are responsible for verifying orders from providers, overseeing the order processing and verifying the finished product. Pharmacist Eugene Malmquist testified that MarinHealth General policy dictates everything pharmacists do each day, including how to verify a blood thinner. (Tr. 180) Pharmacist Dylan Girardi concurred that policies dictate all operations in the hospital. (Tr. 346)

Pharmacists are the most qualified employees in the pharmacy. (Tr. 27-28) Pharmacists may perform most tasks performed by a technician, but generally do not do so. (Tr. 352) All of the witnesses testified that under State law and/or MarinHealth General policy, one pharmacist can supervise a maximum of two technicians at a time. On Dr. Malmquist's afternoon shift with three pharmacists, there are five technicians. (Tr. 177) At night, there is only one pharmacist and one pharmacist technician. (Tr. 371)

Pharmacy technicians employed by MarinHealth General are licensed by the State Board of Pharmacy in California. They are also union represented. There are about six to seven technicians who work the a.m. shifts, six to seven technicians who work the p.m. shifts, and one overnight technician. (Tr. 371) Technicians generally are the first to answer the phone, triage calls, answer questions within their scope of practice, and pass anything else to the pharmacists. (Tr. 302) Pharmacy technicians also perform duties based on the shift to which they are assigned. Some shifts require specific training. For example, Ms. Hensley and IV Compounding Pharmacist/Designated Person Priyanka Patange maintain a list of which pharmacy technicians

² References to the hearing transcript will be Tr. followed by the page number. References to the Employer's exhibits will be Er. Exh. followed by the exhibit number. References to the Union's exhibits, will be Pet. Exh. followed by the exhibit number. References to the Board's exhibits will be Bd. Exh. followed by the exhibit number.

are certified to perform their duties based on the training completed. (Tr. 284-288) Certain shifts do not engage in tasks that involve staff pharmacists. (Tr. 189)

Pharmacy technicians perform their duties as noted in the shift descriptions which are kept in a binder in the pharmacy. (Tr. 130) These shift descriptions include critical tasks to maintain lights on and doors open (“LODO”). (Tr. 301) Pharmacy Technician Monica Grey testified that she knows what she needs to do based on the binder. (Tr. 373) For example, on the 3 p.m. shift, one of the responsibilities is to inventory the outpatient surgery center machines. (Tr. 375) She further testified that if it is a busy shift, she has discretion as to when she performs this task during her shift. (Tr. 375) Ms. Grey testified that technicians are encouraged to also work with one another and support each other in managing workload. (Tr. 302) However, Dr. Chellamy and Director Johnstone testified generally that pharmacists have the authority to rearrange tasks from the list and shift tasks between technicians on different shifts. (Tr. 141; 262)

The pharmacist technician shift lead handles sick calls and staffing issues. Although there is not always a shift lead, the shift lead is responsible for finding shift coverage or splitting the duties of a shift if needed. (Tr. 374) Ms. Grey testified that this decision is made as a result of a discussion between the pharmacist technicians and Ms. Hensley. (Tr. 374)

1. Assignment and Direction

The 2024 Law Book for Pharmacy, Business and Professions Code 4115 (i) dictates that,

A pharmacy technician may perform packaging, manipulative, repetitive, or other nondiscretionary tasks only while assisting and while under the direct supervision and control of a pharmacist. The pharmacist shall be responsible for the duties performed under their supervision by a technician.” (Er. Exh. 2, 141)

Further, Section 1793.1 of title 16 of the California Code of Regulations indicates that, “A pharmacist shall be responsible for all activities of pharmacy technicians to ensure that all such activities are performed completely, safely, and without risk of harm to patients.” (Er. Exh. 2, 622)

The record is clear that pharmacists and technicians generally work together as a team. Dr. Malmquist testified that, in general, pharmacists do not always know what the pharmacy techs are doing or what they’re working on. (Tr. 199) Both Ms. Grey and Dr. Girardi testified that technicians have the discretion to manage their own workflow. (Tr. 378) Dr. Girardi explained that when pharmacists request something from a technician, the technicians do not always drop what they’re doing at the pharmacist’s direction but will figure out who is available to satisfy the request. (Tr. 348) According to Dr. Girardi, if a pharmacist were to direct a technician on the order priority and the technician prioritized it differently, the pharmacist would not interfere with their work. (Tr. 347) However, Dr. Malmquist testified that once or twice a year, if something unusual occurs, he will direct the technicians as to how to change their order priorities. (Tr. 211-212)

When an IV comes in with no formula, a pharmacist is required under the United States Pharmacopeia regulations to create a recipe for the IV with instructions for compounding the

product. (Tr. 31) Dr. Girardi testified that the pharmacists frequently copy and paste from manufacturer instructions. (Tr. 349) Technicians then have access to the recipe and complete the IV based on the pharmacists' formula.

Because technicians perform some of their work separately from the pharmacists, they also photograph their work. (Tr. 185) This is the case for IV compounding where pharmacists review both the photos and the physical work product. (Tr. 185) If there is an error, pharmacists will reject the product and discuss it with the technician. According to Dr. Chellamy, pharmacists will instruct the technician to create a new compound and explain the correction needed. (Tr. 43) However, Dr. Girardi testified that if an IV is made with an error, he will reject the product and the order goes back into the technician's queue to be completed. (Tr. 364) The technician is responsible for completing the work in their queue, so they know to reformulate the IV without direct instruction from the pharmacist. Dr. Girardi explained that, naturally, the technician usually asks why the order was sent back and he explains. (Tr. 364) Dr. Malmquist sends the product back and tells the technician to do it again. (Tr. 184)

When a provider places a STAT order, these orders must be completed within a certain time frame. Dr. Malmquist and Director Johnstone testified that pharmacists have 30 minutes to verify the order. (Tr. 186) Dr. Chellamy did not know the time frame within which STAT orders have to be completed. (Tr. 136) After the provider inputs the order, it moves into the technicians' logistics queue for dispensing tablet medicines. STAT orders are automatically bumped to the top of the queue and highlighted in red. Although Dr. Chellamy testified that pharmacists have the authority to decide which STAT order to prioritize, Dr. Girardi testified that pharmacists do not need to tell technicians when a STAT order comes in and that technicians may utilize discretion when handling STAT orders. (Tr. 38; 350) Malmquist testified that technicians are trained on what medication orders to prioritize, and the STAT labels are self-evident as a priority order. (Tr. 200) Grey explained that if she had multiple STAT orders, she would prioritize an Andexxa order without instruction from a pharmacist because she knows that it is a time-sensitive medication. (Tr. 377)

Occasionally, technicians make requests of pharmacists. Grey testified that she might request a pharmacist to verify a STAT order if needed. (Tr. 376-377) Dr. Girardi concurred that technicians ask pharmacists to verify the medicine so the technicians can deliver it. (Tr. 354) Pharmacists and technicians communicate regularly about delivering medication. According to Dr. Chellamy, pharmacy technicians are required to comply with the pharmacists' direction to deliver medication. (Tr. 35) However, the other witnesses testified to the contrary. Dr. Girardi explained that, depending on the technician's workload and current priorities, they might agree or suggest another employee to perform the task. (Tr. 362) Director Johnstone also testified that technicians might refuse, which would be acceptable if they had another priority of which the pharmacists weren't aware. (Tr. 259) According to Director Johnstone, Dr. Girardi, and Dr. Malmquist, pharmacists should report a technician to management for refusing to deliver a STAT order without a reasonable explanation. (Tr. 366, Tr. 222)

Dr. Chellamy testified that pharmacists use their independent judgement by considering the technicians' abilities when assigning them work. The record also establishes that MarinHealth General maintains a list of the skills and certifications of each technician, which sets forth the tasks they are trained to complete. (Tr. 143; 284) Dr. Girardi also testified that if he needs a

technician to do something, he'll ask the first technician he sees who may then direct him to the correct technician to complete the task. (Tr. 362)

If a technician makes a mistake and the pharmacist catches it, the pharmacist is not held accountable for the mistake. (Tr. 223-224) Pharmacists are held accountable for their own errors in verifying the product. (Tr. 224) For example, Dr. Chellamy testified that she assigned one pharmacist an hour of continuing education for signing off on an expired product. (Tr. 138) In general, if a pharmacy tech is not performing their job well, a pharmacist should report it to Ms. Hensley. (Tr. 184)

Pharmacist Scheduling

Dr. Girardi handles the pharmacist shift scheduling. He receives a shift differential for the hours that he performs this work, which totaled eight hours the month prior to the hearing in this matter. (Tr. 357; 95) Dr. Carpenter trained Dr. Girardi on scheduling. When creating the schedule, Dr. Carpenter creates a template which shows planned rotations for full-time staff on their normally assigned shifts for a four-week period to maximize coverage. (Tr. 320-321) Dr. Girardi then populates the template into Microsoft Shifts. The template predetermines the majority of the schedule and Dr. Gerardi does not change the template. When there are scheduling gaps, Dr. Girardi or Dr. Carpenter solicits per diem availability. There are seven per diem pharmacists. (Tr. 322) Per diem pharmacists submit their availability through Microsoft Shifts, must work two weekend days per month, and may submit for a maximum of five weeks per year as not available, as dictated by MarinHealth General policy. (Tr. 324)

Dr. Girardi approves per-diem based requests on a first come, first served basis. (Tr. 324) The only time he does not follow this method is when it would contradict the Employer's policy regarding payroll or timekeeping considerations, such as rules about consecutive days or minimum time off between a shift. (Tr. 325) Dr. Girardi publishes the schedule on a regular basis dictated by the hospital scheduling calendar. Dr. Carpenter is required to review Dr. Girardi's schedule before it is published. She instructs Dr. Girardi to change the schedule to follow hospital policy as needed. (Tr. 327-328)

Staff pharmacists make requests for paid off time prior to two six-month vacation bidding periods through Microsoft Shifts. (Tr. 328) Dr. Girardi then uses an Excel sheet he created to input the request data and lists the requests in order by staff seniority. (Tr. 330) Dr. Girardi testified that Dr. Carpenter trained him to order the requests by seniority and consider them by seniority. (Tr. 330) However, Dr. Chellamy denied that seniority is considered in this instance. (Tr. 85)

Dr. Girardi testified that Dr. Carpenter established a rule that there can be up to two pharmacists off at one time. (Tr. 330) If only two pharmacists request off, they are guaranteed the requested PTO. (Tr. 330-331) If there are more than two requests, Dr. Girardi reports it to Dr. Carpenter. (Tr. 331) Dr. Girardi handles this by checking on staff flexibility and reaching out to per diems for coverage. (Tr. 332) Once the six-month vacation schedule is populated, requests by per diems are approved on a first come, first served basis with no more than two pharmacists out at a time. (Tr. 332-333)

When considering multiple per diem requests for an extra shift, Girardi also follows first come, first served, keeping in mind individual clinical abilities which are detailed by a list of

which pharmacists are trained for which shifts, as well as pay and time-keeping policies. (Tr. 334)

Testimony regarding Dr. Girardi's ability to assign training and shifts is contradictory. Dr. Chellamy testified that Dr. Girardi has the authority to change a new employee's training period, although he is free to consult with the new pharmacist and Dr. Carpenter. (Tr. 95) Dr. Girardi testified that he provides his opinion as to whether training for new employees can be cut back, but Dr. Carpenter does not always follow his recommendation. (Tr. 336) For example, Dr. Carpenter overrode his suggestions to modifying the training for a new night pharmacist. (Tr. 336)

Dr. Chellamy further testified that Dr. Girardi assigns pharmacists to cover other's shifts. (Tr. 85) However, Dr. Girardi averred that if a pharmacist wants a day off, they should seek to find a swap with a full-time or per-diem pharmacist. (Tr. 338) If they cannot find coverage, then they report to Dr. Girardi or Dr. Carpenter. Generally, all swaps are approved. (Tr. 339) Once the schedule is published, Dr. Girardi cannot change anyone's shift. (Tr. 339-340)

III. BOARD LAW

A. Supervisory Status and Section 2(11) Standard³

The Act expressly excludes supervisors from its protection. Section 2(11) of the Act defines a supervisor as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The three requirements to establish supervisory status are that (1) the putative supervisor possesses one or more of the above supervisory functions, (2) the putative supervisor uses independent, rather than routine or clerical, judgment in exercising that authority, and (3) the putative supervisor holds that authority in the interest of the employer. *N.L.R.B. v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 712–13 (2001) (citing *N.L.R.B. v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573–74 (1994)).

Supervisory status may be shown if the alleged supervisor has the authority either to perform a supervisory function or to effectively recommend the same. The statutory definition of a supervisor is read in the disjunctive. Possession of any one of the enumerated powers, if

³ The Employer has argued that Baker should be excluded from the unit because, as Crematory Manager, he is a supervisor under Section 2(11) of the Act. The Employer has not argued that the Crematory Manager Baker should be excluded because he is a managerial employee.

accompanied by independent judgment and exercised in the interest of the employer, is sufficient to confer supervisory status. *Ky. River Cmty. Care*, 532 U.S. at 713. Supervisory status may likewise be established if the individual in question has the authority to effectively recommend one of the powers, but effective recommendation requires the absence of an independent investigation by superiors and not simply that the recommendation be followed. *Children's Farm Home*, 324 NLRB 61, 65 (1997).

If such authority is used sporadically, the putative supervisor will not be deemed a statutory supervisor. *Coral Harbor Rehabilitation and Nursing Center*, 366 NLRB No. 75, slip op. at 17 (2018) (citing *Gaines Electric*, 309 NLRB 1077, 1078 (1992)). The supervisor has to at least act or effectively recommend such action “without control of others and form an opinion or evaluation by discerning and comparing data.” *Oakwood Healthcare, Inc.*, 348 NLRB 686, 692–693 (2006). Judgment is not independent when the putative supervisor follows detailed instructions (e.g., policies, rules, collective-bargaining agreement requirements). *Id.* at 693. To be independent, “the judgment must involve a degree of discretion that rises above the ‘routine or clerical.’” *Id.* at 693 (citing *J.C. Brock Corp.*, 314 NLRB 157, 158 (1994) (quoting *Bowne of Houston*, 280 NLRB 1222, 1223 (1986)) (“[T]he exercise of some ‘supervisory authority’ in a routine, clerical, perfunctory, or sporadic manner does not confer supervisory status.”). If a choice is obvious, the judgment is not independent. *Oakwood Healthcare*, 348 NLRB at 693. The Board has an obligation not to construe the statutory language too broadly because the individual found to be a supervisor is denied the employee rights that are protected under the Act. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006); *Oakwood Healthcare*, 348 NLRB at 687.

The party asserting supervisory status has the burden of proving supervisory authority and must establish it by a preponderance of the evidence. *Ky. River Cmty. Care*, 532 U.S. at 711; *Oakwood Healthcare, Inc.*, 348 NLRB at 687. This requires the presentation of “detailed, specific evidence” that is not “in conflict or otherwise inconclusive.” *Oakwood Healthcare*, supra at 694; see also *Veolia Transportation Services*, 363 NLRB 1879, 1886 fn. 19 (2016); *G4S Regulated Security Solutions*, 362 NLRB 1072, 1072–1073 (2015); *Busco Tug and Barge, Inc.*, 359 NLRB 486, 490 (2012), enfd. 696 Fed. Appx. 519 (D.C. Cir. 2017). Mere inferences or conclusory statements, without such detailed, specific evidence, are insufficient to establish supervisory authority. *UPS Ground Freight, Inc.*, 365 NLRB 1123 (2017) (citing *Lynwood Manor*, 350 NLRB 489, 490 (2007); *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006)).

The lack of evidence is construed against the party asserting supervisory status. *Dean & DeLuca New York, Inc.*, 338 NLRB 1046, 1047–48 (2003). Similarly, supervisory status is not demonstrated when the evidence is in conflict or inconclusive. *Entergy Mississippi, Inc.*, 367 NLRB No. 109, slip op. at 2–3 (2019). When there is conflicting testimony on the issue, the Board reasonably “prioritizes the testimony of those witnesses who occupy the alleged supervisory role at the time of the hearing,” who denied having that authority. *Avante at Wilson, Inc.*, supra.

Here, the Employer argues that the pharmacists are statutory supervisors because they have the authority to assign work to and responsibly direct pharmacy technicians. No party argues, and no evidence suggests, that the pharmacists possess the authority to hire, transfer, reward, suspend, lay off, recall, or discharge other employees.

1. Assignment

The Board has held that the authority to assign refers to the act of designating an employee to a place (such as a location, department, or wing), assigning an employee to a time (such as a shift or overtime period), or assigning significant overall duties as opposed to discrete tasks. *Oakwood Healthcare*, 348 NLRB at 686, 689. The authority to make an assignment, by itself, does not confer supervisory status. Rather, the alleged supervisor must also use independent judgment when making such assignments. *Id.* at 692–93. Regarding independent judgment in relation to the authority to assign, “the Board has stated that the authority to effect an assignment must be independent [free of the control of others], it must involve a judgment [forming an opinion or evaluation by discerning and comparing data], and the judgment must involve a degree of discretion that rises above the “routine or clerical.” *Croft Metals*, 348 NLRB 717, 721 (2006).

Assignments that are based on well-known employee skills also do not involve independent judgment. *KGW-TV*, 329 NLRB 378, 381–82 (1999). Additionally, basing an assignment on whether the employee is capable of performing the job does not show independent judgment. *Volair Contractors, Inc.*, 341 NLRB 673, 675 n.10 (2004); *Cook Inlet Tug & Barge, Inc.*, 362 NLRB 1153, 1154 (2015) (citing *Croft Metals*, 348 NLRB at 722). No independent judgment is involved when “there is only one obvious and self-evident choice,” and with specific reference to assignment authority, there is no independent judgment if an assignment is made “solely on the basis of equalizing workloads.” *Oakwood Healthcare, Inc.*, 348 NLRB at 693. In *Atlantic City Electric Co. v. N.L.R.B.*, 5 F.4th 298 (3d Cir. 2021), the court found that substantial evidence supported the Board’s determination that the employer had not established that its system operators could assign employees to places or to times. Regarding places, the court commented that although system operators prioritized resources, which determined the need for work at a given location, they did not assign individual employees to places. *Id.*

2. Responsibly Direct

In *Oakwood Healthcare*, the Board held that “for direction to be ‘responsible,’ the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly.” 348 NLRB at 691–92. “Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect

of adverse consequences for the putative supervisor if he/she does not take these steps.” *Croft Metals*, 348 NLRB at 721 (quoting *Oakwood Healthcare*, 348 NLRB at 700).

To establish responsible direction, the Employer must show that the putative supervisors are held accountable for the performance and work of those who work in the department carrying out their recommendations. See *Transdev Services, Inc. v. NLRB*, 991 F.3d 889 (8th Cir. 2021) (upholding the Board’s finding that the employer had not alleged supervisors possessed the authority to responsibly direct employees, observing that the employer had failed to argue or explain how the alleged supervisors were held accountable for the performance of their subordinates, as opposed to their own performance); *Atlantic City Electric Co.*, 5 F.4th at 298 (upholding the Board’s finding that there was no evidence that the system operators were held accountable for the performance of their subordinates or suffered adverse consequences if their subordinates performed poorly). Thus, it is not enough to show that the putative supervisors are accountable for their own mistakes. *Oakwood Healthcare*, 348 NLRB at 695. Additionally, the criteria of responsible direction will not be met without evidence of the “factors weighed or balanced” in directing employees in order to establish the use of independent, nonroutine judgment. See *Croft Metals, Inc.*, 348 NLRB at 722.

IV. ANALYSIS

A. Supervisory Status

Possession of any one of the enumerated powers listed *supra*, if accompanied by independent judgment and exercised in the interest of the employer, is sufficient to confer supervisory status. *Ky. River Cmty. Care*, 532 U.S. at 713. The party asserting supervisory status bears the burden of proving supervisory authority and must establish it by a preponderance of the evidence. *Id.* at 711.

Here, the Employer submitted into the record a document setting forth California statutes regarding the expected requirements of a pharmacist,⁴ but these expectations are no substitute for evidence showing the actual exercise of authority under Section 2(11) of the Act. See e.g., *Pain Relief Centers, P.A.*, 371 NLRB No. 70 (2021) (Statutory schemes other than the NLRA cannot in and of themselves establish supervisory status under the NLRA). Although the State might expect pharmacists to exercise certain authority encompassed by Section 2(11) of the Act and could potentially hold pharmacists accountable for failing to satisfy their obligations under State law, the record does not establish that the Employer holds them accountable, as contemplated by Board law, *supra*.

Dr. Chellamy and Director Johnstone, the Employer’s principal witnesses, testified that they do not work physically in the pharmacies, although they both visit them frequently. Dr. Chellamy testified that her knowledge of the pharmacists’ job duties comes from her daily visits to the pharmacies, daily staff meetings in the pharmacies, conversations with Dr. Carpenter, and reports regarding missing medicals and phone calls. (Tr. 36-38) As for Director Johnstone, her

⁴ See Er. Exh. 2.

knowledge comes from her visits to the pharmacies, occasional work in the pharmacies, and her prior experience working as a pharmacist. (Tr. 262) Thus, where their testimony conflicts with that of the pharmacists and pharmacist technician's, more weight is given to the first-hand testimony of those currently occupying those positions; namely, Dr. Malmquist, Dr. Girardi, and Ms. Grey. *Avante at Wilson, Inc.*, supra.

Regarding Dr. Girardi's scheduling responsibility, Dr. Chellamy's testimony is based on her review of exception reports for Dr. Girardi's shift differential, her experience scheduling technicians, and her supervision of Dr. Girardi's supervisor, Dr. Carpenter. (Tr. 82) Much of Dr. Chellamy's testimony about the precise scheduling responsibilities of Girardi was either speculative or conclusory, lacking the first-hand knowledge and specifics necessary to support a finding of supervisory status. (Tr. 75; 85–87.) *UPS Ground Freight, Inc.*, supra. Moreover, as discussed in more detail below, Dr. Chellamy's testimony about what she expects of Dr. Girardi's scheduling conflicts with Dr. Girardi's testimony about what responsibilities he was carrying out. Again, Dr. Girardi's testimony is given more weight. *Avante at Wilson, Inc.*, supra.

1. Assign and Responsibly Direct

The pharmacists at issue here do not assign the work schedules of technicians. Ms. Hensley handles their schedules and technicians typically sort out coverage issues among themselves and the shift lead, if there is one. (Tr. 372)

The pharmacists also do not assign technicians to a place or to significant overall duties. The technicians' job location is determined by their shift and their critical duties determined by the shift descriptions. (Tr. 130) Technicians must be trained and certified to work certain shifts and perform functions, such as IV compounding. (Tr. 284-288) While pharmacists may request a technician to deliver a drug or prioritize a STAT order, technicians have discretion to refuse such a task if their current work is a higher priority. (Tr. 259) In general, pharmacists and technicians collaborate with one another. If a technician is not able to complete a pharmacist's request, they will direct the pharmacist to a technician who can. (Tr. 348)

The party seeking to establish supervisory authority must show that the putative supervisor has the ability to *require* that a certain action be taken; supervisory authority is not established where the putative supervisor has the authority merely to *request* that a certain action be taken, *Golden Crest Healthcare Center*, supra. Thus, it has not been shown that the pharmacists assign work to the technicians.

Dr. Girardi is also involved in issuing the pharmacists' schedule. Although Dr. Chellamy testified that Dr. Girardi has the authority to assign shifts to pharmacists, adjust training for new employees, and approve PTO with discretion, Dr. Girardi's own testimony indicates the opposite. The creation of the pharmacists' schedule is primarily done by Dr. Carpenter through a template. (Tr. 322) For the gaps in the schedule, Dr. Girardi solicits coverage from per diems, whose bids are approved on a first come, first served basis. (Tr. 322) In general, he approves all shift swaps. (Tr. 339) Regarding adjustments to training, Dr. Girardi testified that Dr. Carpenter has overruled his recommendations to change a new employee's training period. (Tr. 336) Finally, he follows pre-established procedures for approving PTO requests. (Tr. 328-334) Accordingly, it has not been shown that Dr. Girardi assigns work schedules to other pharmacists.

Regarding the pharmacists' asserted "responsible direction" of others, the Board holds that the person directing and performing the oversight of employees must be accountable for the performance of that work, such that the putative supervisor faces adverse consequences if the work does not meet expectations. *Oakwood Healthcare*, supra at 691–92. Although the Employer takes the position that the pharmacists are held accountable for the technicians' work product, Dr. Girardi and Dr. Malmquist testified that pharmacists are not disciplined for the technicians' mistakes. (Tr. 223, 299) Rather, Pharmacists are held accountable for their own mistakes. The record does not establish that a pharmacist has ever faced adverse consequences solely as a result of the actions of a technician.⁵ Accordingly, it has not been shown that the pharmacists responsibly direct other employees. See *Entergy Mississippi, Inc.*, 357 NLRB 2150, 2154–55 (2011), *enfd. in relevant part* 810 F.3d 287 (5th Cir. 2015) ("Every circuit court that has interpreted *Oakwood* has read it to require responsibility for others' actions." (citations omitted)).

In sum, I conclude that the Employer has not met its burden of establishing that pharmacists have the authority to assign work to other employees, or to responsibly direct them.

Secondary Indicia

Nonstatutory indicia can be used as background evidence on the question of supervisory status but are not themselves dispositive of the issue in the absence of evidence indicating the existence of one of the primary or statutory indications of supervisory status. See *Training School at Vineland*, 332 NLRB 1412, 1412 fn. 3 (2000); *Chrome Deposit Corp.*, 323 NLRB 961, 963 fn. 9 (1997). Cf. *K.G. Knitting Mills*, 320 NLRB 374 (1995) (reversing, where no primary indicia were present, finding of supervisory status based solely on fact individual had key to factory, opened facility in the morning, "watche[d] everything" before the manager arrived, and dealt with trucks arriving at plant). Five such secondary indicia commonly mentioned are the ratio of alleged supervisors to employees, differences in terms and conditions of employment, attending management meetings, ability to approve time off, and how the individual in question is held out to (or perceived by) other employees.

Here, there are approximately 21 employees in the petitioned-for Unit. By law, pharmacists can supervise no more than two pharmacist technicians at a time. On the overnight shift, there is one pharmacist and one pharmacist technician. Thus, the ratio of disputed supervisory personnel to employees is no more than 1:2 during the day and 1:1 during the evening. Girardi is unique in that he receives a shift differential for his scheduling work, although he only receives it for the specific hours required to complete the schedule. (Tr. 357:3-9) The record does not show that any pharmacist attends management meetings. Girardi does not have the authority to grant time off to more than two pharmacists at a time (per Employer policy), unless there is coverage. He does not have the authority to approve or require other employees to work overtime.

⁵ The pharmacist possesses the license which allows medicine to be given to a customer, and thus is ultimately responsible for all dispensed medicine. However, this is a professional responsibility which does not render the pharmacists supervisors under the Act.

In concluding that the pharmacists are not statutory supervisors, I nevertheless note that, for what little it's worth, pharmacists are the highest-ranking employees in the pharmacy. For his part, Girardi receives additional pay for his scheduling duties. However, none of the primary indicia are present on this record and, accordingly, the Employer has not met its burden of proving that the pharmacists are supervisors within the meaning of Section 2(11) of the Act.

The Employer's Argument

In support of its contention that pharmacists are statutory supervisors, the Employer points to two cases, which are distinguishable from the instant case.

First, the Employer relies on *Entergy Mississippi, Inc.*, 367 NLRB No. 109 (2019), in which the Board determined that dispatchers were statutory supervisors where they:

assigned employees to places by prioritizing multiple outages and deciding how many employees to send to repair the outages. The Board also found that these decisions involved independent judgment, insofar as dispatchers considered a range of factors when prioritizing outages (including the priority of the customer affected, location of outages, whether additional "trouble" is likely to occur, current and future weather conditions, and whether a particular outage is likely to cause damage to the Respondent's property). The Board emphasized that there were no standard operating procedures or rules for dispatchers to follow when prioritizing outages, but instead relied on their training and knowledge to best respond to outages.

Here, unlike the fact pattern set forth above, pharmacists do not assign tasks or locations to pharmacist technicians. They do not consider a "range of factors" when assisting technicians in determining priority status of STAT orders and the like. It is largely self-evident. There are standard operating procedures and established policies of which all in the pharmacy are aware and assertedly follow.

Next, the Employer cites to an Advice Memorandum issued in Case No. 4-CA-31560 *FHCS Physician Servs.*, (2003). In that case, Advice found that the subject physicians were statutory supervisors as they were the highest-ranking employee on duty and accountable for the results of outpatient care. Further, that Medicare, the state, federal, and accreditation bodies required physician supervision of house staff patient care lent support to the supervisory finding. However, this memorandum issued from the then-General Counsel's office, not the Board, and does not have any legal authority or value. I note that it also issued prior to the Board's *Oakwood* decision, in which the Board clarified that to satisfy the "responsibly direct" criteria, the putative supervisor must be held accountable for others' work. Because there is no evidence in the record that pharmacists face adverse consequences for the performance failures or shortcomings of the technicians, the pharmacists have not been shown to responsibly direct the technicians in their work.

CONCLUSION

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, as stipulated by the parties, and it will effectuate the purposes of the Act to assert jurisdiction.
3. The parties stipulated, and I find, that Union is a labor organization within the meaning of Section 2(5) of the Act.
4. The parties stipulated, and I find, that that there is no collective-bargaining agreement covering any of the employees included in the appropriate unit, and there is no contract bar or other bar to an election.
5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
6. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time, regular part-time and per diem Pharmacists employed by the Employer at its facility located at 250 Bon Air Road, Greenbrae, California.

Excluding: All other employees, confidential employees, employees represented by other labor organizations, guards and supervisors as defined by the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by the National Union of Healthcare Workers (NUHW).

A. Election Details

The election will be conducted by mail. The ballots will be mailed to employees employed in the appropriate collective-bargaining unit from the office of the National Labor Relations Board, Region 20, on January 24, 2025, at 5:00 p.m. The mail ballots will be counted via ZOOM for Government on Friday, February 14, 2025 at 10:00 am. In order to be valid and

counted, the returned ballots must be received in the Regional Office prior to the counting of the ballots.

Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by February 3, 2025, as well as those employees who require a duplicate ballot, should communicate immediately with the National Labor Relations Board by either sending an email to SanFrancisco.Region20@nlrb.gov, calling the Region 20 Election Clerk at 628-221-8837, or the Region 20 Office at (415) 356-5130. In order to receive the quickest response, employees should contact the National Labor Relations Board from the phone number or email address that is on record with the Employer, which is the information listed on the voter list. In order to maintain confidentiality and secrecy in this election, the voter should contact the National Labor Relations Board directly. You may ask your Employer which contact information it provided for use in this election. Requests by the election parties for a duplicate ballot on behalf of voters will not be accepted.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending January 11, 2025, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. In a mail ballot election, employees are eligible to vote if they are in the unit on both the payroll period ending date and on the date they mail in their ballots to the Board's designated office.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period, and, in a mail ballot election, before they mail in their ballots to the Board's designated office; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(1) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names,

work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by January 22, 2025. The list must be accompanied by a certificate of service showing service on all parties. **The Region will not serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the enclosed Notice of Election in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is

responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review. Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: January 17, 2025

/s/ Daniel J. Owens

DANIEL J. OWENS
ACTING REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 20
450 Golden Gate Ave.
3rd Floor, Suite 3112
San Francisco, CA 94102